IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

I.T.A. No. 502 of 2006
DATE OF DECISION: 7.9.2007

Commissioner of Income Tax (Central), Ludhiana

…Appellant

Versus

Hazara Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Vivek Sethi, Advocate for the appellant-revenue.

M.M. KUMAR, J.

The revenue has approached this Court by filing instant appeal under Section 260A of the Income-tax Act, 1961 (for brevity, 'the Act'), challenging the order dated 11.5.2006, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for brevity, 'the Tribunal') in IT(SS) A. No. 28 (ASR)/2004, for the block period 1.4.1990 to 1.3.2001 holding that the surcharge was not leviable in the case of the present assessee as the search took place prior to 1.6.2002, i.e. before the proviso to Section 113 was inserted in the Act. It has been claimed that the following substantive question of law would arise for determination of this Court:-

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in cancelling the levy of surcharge on the tax worked out on the undisclosed income for the reason that search took place prior to 01.06.2002, whereas the amendment in the proviso to Section 113 had been made effective from 01.06.2002?"

We have issued dasti notice to the respondent and according to the office report service is complete. Despite service no one has put in appearance on behalf of the respondent.

The assessee-respondent is an individual. His residential and business premises were searched under Section 132(1) of the Act on 1.3.2001 and proceedings under Section 158BC of the Act were started by issuing notice on 10.6.2002. He filed return on 8.8.2002 declaring undisclosed income at Rs.13,00,000/- and assessment was completed under Section 158BC of the Act on 31.3.2003, determining the undisclosed income at Rs.13,00,000/-. The Assessing Officer also levied surcharge amounting to Rs.1,32,600/- on the tax liability of Rs.7,80,000/- calculated on the undisclosed income (A-1). The assessee-respondent filed an appeal before the CIT (A)-I, Ludhiana, who vide his order dated 27.8.2004 deleted the surcharge by accepting the contention of the assessee-respondent that amendment to Section 113 of the Act made in 2002 enabling levy of surcharge to block assessment was to apply prospectively in respect of search conducted on or after 1.6.2002 (A-2). As the search in the case of the assessee-respondent had taken place on 1.3.2001, the amendment was not applicable. On further appeal by the revenue, the Tribunal upheld the

order passed by the CIT(A) and dismissed the appeal holding that the surcharge was not leviable.

Learned counsel for the revenue has argued that although amendment to Section 113 of the Act took place w.e.f. 1.6.2002, there were adequate provisions relating to levy of surcharge made by the Finance Act, 2000 and the same would be applicable to the case of the assessee-respondent because search in his premises took place during the financial year 2000-2001. Learned counsel has strenuously contended that the Finance Act, 2000 clearly mention levy of surcharge for all categories of assessees' such as individual, HUF, firms etc. Therefore, it has been emphasised that surcharge as applicable was rightly added by the Assessing Officer to the tax payable under Section 113 of the Act.

After hearing the learned counsel, we do not find any merit in this appeal. Chapter XIV-B was introduced in the Act in 1995 which devises a special procedure for assessment of the search cases. After July 1, 1995, in all those cases where search and seizure operations were conducted under Section 132 of the Act or any requisition was made under Section 132A, the assessments of the income detected as a result of search and seizure are to be completed under new provisions of Chapter XIV-B by taking the block period of ten assessment years preceding the previous year in which the search was conducted including the period upto the date of commencement of such search or date of such requisition. The rate of tax is different from the rate of tax in the usual procedure. The undisclosed income in question had to be taxed in the hands of the assessee under the provisions

applicable to block assessments read with Section 113 of the Act. The provision of Section 113 of the Act was inserted by Section 24 of the Finance Act, 1995 w.e.f. 1.7.1995 which provided special rate of tax in cases of block assessment of search cases. The rate prescribed under the said provision has been fixed at flat rate of 60% of the undisclosed income. However, a proviso came to be added by the Finance Act 2002 w.e.f. 1.6.2002 whereby a surcharge was levied in the case of block assessments. It would be apposite to reproduce the amended Section 113 which reads thus:-

> "113. Tax in the case of block assessment of search cases.- The total undisclosed income of the block period, determined under section 158BC, shall be chargeable to tax at the rate of sixty per cent.
>
> Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under section 132 or the requisition is made under section 132A."

Accordingly, the levy of surcharge shall be in those cases where the search and seizure has taken place after 1.6.2002 as the introduction of surcharge under the proviso would operate prospectively. The aforesaid interpretation finds support from a Division Bench judgment of this Court in **Commissioner of Income-Tax v. Roshan Singh Makkar, [2006] 287 ITR 160**. This Court again in the cases of **Commissioner of Income Tax, Jalandhar-1 v. Rajiv Bhatara**

(I.T.A. No. 587, decided on 6.8.2007) and **Commissioner of Income-tax (Central), Ludhiana v. Harmanpreet Singh (I.T.A. No. 554 of 2006, decided on 14.8.2007)** has taken the same view. The Madras High Court has followed the aforesaid view in **Commissioner of Income-Tax v. Neotech Company (Firm), [2007] 291 ITR 27 (Mad)**, **Commissioner of Income-Tax v. Dr. K. Senthilnathan, [2007] 291 ITR 30 (Mad)** and **Commissioner of Income-Tax v. S. Palanival, [2007] 291 ITR 33 (Mad).**

Now adverting to the argument raised on behalf of the learned counsel for the revenue, apparently the same appears to be attractive but after closely scrutinizing the same, we do not find any weight therein. A reference is made to Sections 4 and 158BA of the Act which are relevant and they read thus:-

> "**4.** (1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person:
>
> **Provided** that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.
>
> (2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the

source or paid in advance, where it is so deductible or payable under any provision of this Act."

Section 158BA

158BA. (1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995 a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

Explanation.- For the removal of doubts, it is hereby declared that-

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) the total undisclosed income relating to the block period shall not include the income

assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period.

(3) Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period."

Section 4 of the Act contains the charging provisions. On analysis of Section 4 of the Act, it would emerge that;

a) Annual Finance Act prescribes the rate or rates for the year at which income tax is to be charged;

b) the charge of income tax is on every person and those assessable entities specified in Section 2 (31);

c) the income is that of the previous year; and

d) the levy is on the total income of the assessable

entity computed in accordance with and subject to the provisions of the Act.

The relevant provision of Paragraph A of the First Schedule of the Finance Act 2000 reads as under:-

"**THE FIRST SCHEDULE, Paragraph A.** In the case of every individual or Hindu undivided family or association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) or clause (3l) of section 2 of the Income-tax Act, not being a case to which any other Paragraph of this Part applies,-

Rates of income-tax

XX	XX	XX	XX
XX	XX	XX	XX

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph or in section 112 or section 113 shall,-

(i) in the case of every individual or Hindu undivided family or association of persons or body of individuals having a total income exceeding sixty thousand rupees, be reduced by the amount of rebate of income-tax calculated under Chapter VIII-A, and the income-tax as so reduced.

(ii) in the case of every person, other than those mentioned in item (i), be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent of such income-tax:

Provided that no such surcharge shall be payable by a non-resident:

Provided further that in case of persons mentioned in item (i) above having a total income exceeding sixty thousand rupees, the total amount payable as income-tax and surcharge on such income shall not exceed the total amount payable as income-tax on a total income of sixty thousand rupees by more than the amount of income that exceeds sixty thousand rupees."

Thus, by virtue of Section 4 of the Act, Paragraph-A of the First Schedule of the Finance Act, 2000 which came into force on Ist April, 2000 would govern the cases relating to all the assesses who are assessable under normal procedure/ provisions of the Act for the assessment year 2000-2001.

Chapter XIV-B which was introduced w.e.f. 1.7.1995 contains Section 158BA which provides that in all cases of block assessments, the tax shall be chargeable as per provision of Section 113 of the Act. Sub-section (1) of Section 158 BA opens with a non-obstante Clause, namely, "notwithstanding anything contained in any other provisions of this Act" and, therefore, it is an overriding section and has overriding impact on the rest of the Act. In other words,

Section 158BA would prevail over any other provisions of the Act. According to sub-section (1) where a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A in the cases of any person, then the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provision of Chapter XIV-B in Sections 158B to 158BH of the Act.

Sub-section (2) of the said Section provides that the total undisclosed income relating to the block period shall be charged to tax at the rates specified in Section 113 of the Act as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not. Section 113 of the Act prescribes a special rate of tax i.e. @ 60% for the income of the block period determined under Section 158 BC. Section 113 of the Act is the charging Section which clothes an Assessing Officer to recover tax at the rate (s) specified therein from those assessees who are assessed under Chapter XIV-B. Though by Finance Act, 2000, the rate of surcharge on income assessed under Section 113 of the Act has been specified but Section 113 did not contain reference to Finance Acts till amendment was made therein by Finance Act, 2002 whereby a proviso was added thereto by virtue of which surcharge became leviable as per the relevant Finance Act. Sections 158BA and 113 constitute a complete code in themselves and being totally independent provided for levy of surcharge with effect from 1.6.2002.

Still further, it is trite law that taxing statute has to be strictly construed and nothing can be read into it. If a provision is capable of two interpretations/construction, then one which favours the subject is to be followed. It deserves to be noticed that the Apex Court in **Commissioner of Income-tax, West Bengal-I v. Vegetable Products Ltd., [1973] 88 ITR 192 (SC**) and **Commissioner of Income-tax, Lucknow v. Madho PD. Jatia, [1976] 105 ITR 179 (SC)** has also laid down that where there is any ambiguity with regard to interpretation of the taxation provision, the one which favours the assessee has to be adopted. Accordingly, we hold that the assessee was not liable to pay surcharge in respect of search which was conducted on 1.3.2001.

In all fairness to the learned counsel for the revenue, we now refer to a Division Bench judgment of this Court in the case of **Lalit Hoisery and others v. Union of India and others (CWP No. 2046 of 2005, decided on 18.10.2006)** on which reliance had been placed by him wherein relying upon Paragraph-A of the First Schedule appended to the Finance Act, 2000, the Division Bench had held that surcharge is leviable on the searches conducted after 1.4.2000. A perusal of the judgment in Lalit Hoisery's case (supra) shows that the provisions of Section 158BA (2) of Chapter XIV-B of the Act were not brought to the notice of this Court deciding the said case. Therefore, the judgment in Lalit Hoisery's case could not be considered to be an authority for the proposition that in view of Section 158BA (2) of the Act without adding proviso to Section 113 of the Act which had been added only w.e.f. 1.6.2002, still provisions of Paragraph-A of the First Schedule appended to the Finance Act, 2000 would govern the levy of surcharge

in case of block assessment before 1.6.2002.

In view of the above, the question posed is answered against the revenue and in favour of the assessee. The appeal is accordingly dismissed.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

September 7, 2007
Pkapoor/gbs

**Draft for kind perusal and approval of
Hon'ble Mr. Justice M.M. Kumar**

(Ajay Kumar Mittal)